IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-6386

WILLIAM JAMES RUMMEL,

*Petitioner,*

*v.*

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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### STATEMENT OF THE CASE

In its Statement of the Case, the State claims that Rummel "neglects to note that the record reflects" other charges and convictions in addition to the three convictions for which he received his life sentence. Brief for the Respondent at 3. Rummel did not discuss extraneous charges because any such charges are neither relevant here nor even part of the record. *See* text accompanying notes 6-9 *infra.*

## ARGUMENT

### I

### RUMMEL'S AUTOMATIC LIFE SENTENCE UNDER THE TEXAS HABITUAL OFFENDER STATUTE IS CRUEL AND UNUSUAL BECAUSE IT IS GROSSLY DISPROPORTIONATE TO THE THREE PETTY PROPERTY OFFENSES UNDERLYING THE SENTENCE.

### A.

### The State Misreads This Court's Prior Eighth Amendment Decisions.

The State's attempt to portray this Court's prior Eighth Amendment decisions as hostile to the application of a disproportionality test to sentence length must fail because neither the old sentence length cases,[1] the

[1]The State inferentially mischaracterizes three cases. First, the state implies that the majority in O'Neil v. Vermont, 144 U.S. 323 (1892), rejected the merits of a disproportionality objection in a 54-year sentence for the sale of liquor. Brief for the Respondent at 8 ("The majority . . . refused even to address the [Eighth Amendment] contention"). But in that case, which occurred before the Court applied the Eighth Amendment to the States through the Fourteenth Amendment, *compare id.* at 335-37 (majority opinion), *with id.* at 362-65, 370-71 dissenting opinions); *see* Brief for the Petitioner at 16 n.5; *cf. id.* at 23 n.10 (discussing *O'Neil*), the *O'Neil* majority never even reached the disproportionality issue because the Court dismissed the case for lack of a federal question.

Second, the State infers that this Court rejected a similar claim in Badders v. United States, 240 U.S. 391 (1916), raised by a defendant who had received 35 years for mail fraud. Brief for Respondent at 8. But as the en banc court below noted, Rummel v. Estelle, 587 F.2d 651, 655 n.7 (5th Cir. 1979), *cert. granted*, ___ U.S. ___, 99 S. Ct. 2403 (1979), the defendant in *Badders* received only a 5-year sentence (5 years on each of 7 counts, to be served concurrently), and the Court in that case never considered the sentence length issue because the defendant never raised it. *See* Brief for the Petitioner at 22 n.9.

Finally, as the Weems v. United States, 217 U.S. 349 (1910), which ruled excessive a 15-year sentence at hard labor, the State

[footnote continued]



recent death penalty cases,[2] nor constitutional history[3] support the State's position.

Moreover, not only has the Court never suggested use of an Eighth Amendment standard for non-death cases different from the one used in death cases,[4] but there is no reason why the standard should change. Although the test should be applied with greater exactitude when life is at stake, that is a different question. Any standard other than those outlined in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (discussed in Brief for the Petitioner at 24)—such as the Fifth Circuit's pre-*Rummel* test that

argues that the Court would not have reached the same result if the punishment had not included hard labor and various civil disabilities. Brief for the Respondent at 8. But as Rummel pointed out, Brief for the Petitioner at 21-22 n.9, and as more recent decisions have recognized, *see id.* at 22 n.9 (citing cases), while *Weems* rested on both the length and the inherent cruelty of the sentence, the Court indicated that either ground alone would have sufficed to invalidate the sentence.

[2]Rummel concedes the unique severity of the death penalty, *id.* at 61, and accepts the greater burden he must discharge in a non-capital case but rejects as unjustly insurmountable the rational basis test urged by the State, under which no sentence could ever be judged excessive, *see id.* at 66-67.

[3]Rummel applauds the State's attempt to demolish an argument that Rummel never raised—"that the Framers intended the Eighth Amendment to apply merely to long punishments." Brief for the Respondent at 9. Rummel has argued only that the Framers' intent is unclear, that both logic and history suggest that the Framers may have intended to incorporate the proportionality concept into the Eighth Amendment, and that they surely intended for the meaning of the moral concept inherent in the word "cruel" to evolve. Brief for the Petitioner at 20-21 n.8.

[4]*See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 667 (1977) (corporal punishment case; citing death and non-death cases); *cf.* Gardner v. Florida, 430 U.S. 349, 358 (1977) (sentencing procedures in both capital and non-capital cases must meet same due process requirements).

asked whether a punishment was "so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice"[5]—lacks any objective guidelines, would allow judges to substitute their own views for those of the Legislature, and would engender the very uncertainty decried by the State, *see* Brief for the Respondent at 27-28.

B.

**The State Cannot Rely on Alleged Convictions That Did Not Trigger Rummel's Life Sentence, That Were Never Proven at Trial, and That Are Not in the Record.**

In its Brief opposing Rummel's Petition for Certiorari, Respondent's Brief in Opposition at 13, and again in its Brief on the merits, Brief for the Respondent at 3, 13 n.3, 14, 15 & n.4, the State claims for the first time in this case (six years after Rummel was convicted and sentenced to life imprisonment for three petty property offenses) that Rummel has other convictions in his past. Apart from the inadequacy of the State's proof,[6] Rummel objects on at least three grounds to this disgraceful attempt to circumvent the rules of evidence and appellate procedure.

[5]Rogers v. United States, 304 F.2d 520, 521 (5th Cir. 1961) (cited in *Rummel* 587 F.2d at 655 (en banc opinion)). Courts in many states have employed a different formulation of the same general principle. *See e.g., In re* Lynch, 503 P.2d 921, 930 (Cal. 1973) (en banc) (citing cases in 4 states).

[6]The State's claim that the record reflects pending charges, "at least one of which resulted in a [fourth] felony conviction," Brief for the Respondent at 3, is supported by the flimsiest of "proof": (1) an arrest warrant (A.1) and a surety motion (A.2) reflecting that Rummel was then (January 30, 1973) in county jail "on other charges," including swindling by check, and (2) an undated letter, ostensibly signed by Rummel, to the court in which Rummel received his life sentence, giving "official notice of appeal" in "cause No. *unknown* swindling by worthless check 0/50 of which I was convicted and sentenced in your court the 10th April 1973" (A.3).

[footnote continued]



First—and most fundamentally—even if the State's claim were true, the additional offenses are immaterial. By mandating life sentences for those convicted of a third felony, the Texas Legislature foreclosed proof of mitigating circumstances and pleas for mercy and compassion. The State now seeks to prove enhancing circumstances allegedly justifying the harsh retribution inflicted on Rummel. But the State cannot have it both ways. If extraneous circumstances had been admissible during the sentencing stage of the trial to assist a sentencing authority with discretionary power over Rummel's punishment, surely Rummel would never have received a life sentence. But no such proof was admissible then, and it should not be now. Rummel's life sentence must stand or fall on the

Such "evidence," even if it had been introduced at trial and were somehow material, substantiates none of the State's reckless accusations of final convictions, felony or misdemeanor. *Compare* Elizalde v. State, 507 S.W.2d 749, 752 (Tex. Crim. App. 1974) (named identical to defendant's appeared on prison packet of proceedings in prior trial that had been admitted in evidence without objection; held, no proof of identity). *See also id.;* Cain v. State, 468 S.W.2d 856, 859 (Tex. Crim. App. 1971) (neither certified copies of records from prior convictions alone nor such records plus copies of the defendant's fingerprints in those cases are sufficient to proof identity); *accord*, Brief for the Respondent at 13. Moreover, since none of these documents was ever identified, authenticated, or explained at trial, they are not now before the Court. *See* note 9 *infra*.

The State argues that the en banc court below found as fact a fourth felony. *Id.* at 19-20. But the court below could not properly make such a finding based on facts outside the record. *See, e.g.*, Hassenflu v. Pyke, 491 F.2d 1094, 1095 (5th Cir. 1974) ("It is inappropriate . . . to base an appellate opinion on assertions dehors the record"); Garcia v. American Marine Corp., 432 F.2d 6, 8 (5th Cir. 1970) (per curiam) (affidavit attached to appellate brief could not be considered).

three offenses named in the indictment[7] (R.79-81) and found true by the jury (R. 281) because these offenses alone triggered the sentence.

Second, the claimed convictions are irrelevant because none could have been used to enhance Rummel's sentence under the Texas habitual offender statute.[8]

Finally, the State waived whatever opportunity it might have had to prove additional offenses by not presenting evidence to the convicting court, or at least to the federal district court that denied Rummel's habeas corpus petition. The State's reliance on matters outside the record is a practice consistently condemned by this Court.[9]

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[7] Texas courts uniformly require that a prosecutor give notice in the indictment of any prior offenses that will be used to justify an enhanced penalty. *E.g.*, Hollins v. State, 571 S.W.2d 873, 875-76 (Tex. Crim. App. 1978) (discussing numerous cases) (the accused is entitled to notice of the claimed former convictions so that if possible he can show a mistake in identity, no final conviction, or some other defect).

[8] Every offense claimed by the State fails one or more of the following four enhancement requirements: First, only felonies can be used for enhancement under the statute. *E.g.*, Clifton v. State, 156 Tex. Crim. 655, 246 S.W.2d 201, 203 (1951) (denying motion for rehearing) (prior misdemeanors cannot be used to enhance punishment for a subsequent felony conviction). Second, each conviction must have been committed after the final conviction for the preceding offense. *Accord*, Brief for the Respondent at 12. Third, a probated sentence prevents a conviction from being final for enhancement. Davis v. Estelle, 529 F.2d 437, 440 & n.7 (5th Cir. 1976) (citing cases). Finally, a conviction pursuant to a guilty plea cannot be used for enhancement if the defendant was not represented by counsel at the time of the plea. *E.g.*, *Ex. parte* Martinez, 508 S.W.2d 359, 360 (Tex. Crim. App. 1974).

[9] *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-58 n.16 (1970) ("Manifestly, it [an *ex parte* statement of a witness]

[footnote continued]



Thus, the State's requested remand to the district court for an opportunity to prove those offenses, Brief for the Respondent at 32, 36, would be superfluous.

C.

**The State's Argument That a Life Sentence Is Not a Life Sentence Because Rummel *May* Be Paroled Demonstrates the Futility of Relying on the Good Graces of the Parole Board and the Governor.**

The State argues that Rummel's sentence is not truly a life sentence because (1) Rummel *might* get good time credit for twelve years and become eligible for parole, *see id.* at 16-17, (2) the Parole Board *might* then recommend that the Governor parole him, *id.* at 17, (3) the Governor *might* accept the Parole Board's recommendation and parole him, (4) the Board *might* place him on annual reporting status after three years on parole, *id.* at 24, (5) and the Board *might* place him on non-reporting status after another year on parole, *id.* at 25. Moreover, the State presents statistics purporting to demonstrate that parole is easily obtained and virtually guaranteed within four years, *id.* at 21,[10] unless Rummel "evinces no demonstrable indicia of rehabilitation, [in which case] he may never be released," *id.* at 17.

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cannot be properly considered by us in the disposition of the case"); Hopt v. Utah, 114 U.S. 488, 491 (1885) ("The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record . . . and not by *ex parte* affidavits"); Russell v. Southard, 53 U.S. (12 How.) 138, 158 (1851) ("This court must affirm or reverse upon the case as it appears in the record"). *See also* ABA, *Project on Standards for Criminal Justice* §§ 5.9, 8.4(c) (Approved Draft 1971) (quoted in R. Stern & E. Gressman, *Supreme Court Practice* 717 (5th ed. 1978)) (reference to matters outside the appellate record is "a grave violation of ethical standards").

[10] The statistics cited by the State (S.16) demonstrate no such guarantee. They show only that few people seek parole after three years and that even fewer succeed in obtaining it.

But the State's chain of argument fails because each link depends on definition on an act of grace, granted on no fixed basis and according to no ascertainable standard. By state law, good time credit "is a privilege and not a right." Tex. Rev. Civ. Stat. Ann. art. 6181-1 §4 (Vernon Supp. 1978) (S.1a). It may be forfeited by non-criminal conduct. *Id.* (violation of prison rules). Likewise, parole and the conditions imposed incidental to parole result from acts of mercy, not the operation of law. *See* Brief for the Petitioner at 33.

The State implores this Court to avoid being "unrealistic" in viewing Rummel's sentence. Brief for the Respondent at 21. But in Rummel's world, parole is not a "realistic" expectation. In *Greenholtz v. Inmates*, ___ U.S. ___, 99 S.Ct. 2100 (1979), the Court held that a convicted person has no constitutional right to parole, *see id.* at 2104-05 (discussed in Brief for the Petitioner at 33). If state officials can deny parole at whim, Texas cannot rely on Rummel's "mere hope" for parole, *id.* at 2105, as a crutch to support its position, no matter how high the average prisoner's parole possibilities.[11] Irrespective of the State's protests to the contrary, the outcome of this case will determine for all time whether Rummel will ever have the right to be free. Surely for federal constitutional purposes, Rummel's life sentence means life.

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[11]The governor of Texas recently highlighted the transitory character of the parole "privilege" by increasing significantly the percentage of Parole Board parole recommendations rejected by his office. *See, e.g.*, Baker, Board of Paroles finds Clements a tough warden, Austin American-Statesman, Sept. 23, 1979, §A, at 1, col. 1 (Texas Governor vetoed 79% of June 1979 parole recommendations and 33% since March 1979, compared to less than 5% for most previous governors).



D.

**A Decision in Rummel's Favor Would Not Hamper Administration of the Habitual Offender Statute.**

The State's concern that 46 habitual offenders may "flood" Texas courts with their claims, Brief for the Respondent at 26, is amusing if not alarming, since (1) 46 in 15 years, Table 1 (C.1 n.1), is hardly a flood, (2) 12 of these had their convictions reversed (*see* C.20-21), and (3) a large portion of the remaining 34 were probably indicted for at least one violent felony when assessed their life sentences. Since so few prisoners would qualify to seek relief under the standard Rummel argues here, the State's prediction that a decision declaring Rummel's sentence excessive would engender chaos among state officials, Brief for the Respondent at 27-28, exaggerates the potential problem, *see* Brief for the Petitioner at 63-65.

The "levelling" effect that the State fears from an adverse decision is minimal. Texas could still adopt a scheme imposing a relatively longer sentence than that in other jurisdictions. The State would only have to observe an outer limit beyond which it could not "experiment" without exceeding constitutional restrictions. The proportionality concept is misnamed: instead of requiring strict proportionality between crime and punishment, which would stifle state experimentation, it only prohibits gross disproportionality.

The State's mischaracterization of Rummel's position as an attack on prosecutorial discretion, Brief for the Respondent at 30-31, exposes the State's desperately weak position. As Rummel has often pointed out, *see, e.g.*, Brief for the Petitioner at 73, Rummel questions only the Legislature s decision to give the prosecuter the power to indict him as a habitual offender and subject

him to an automatic life sentence for trivial offenses. He does not challenge the prosecutor's decision to use that power.

## II

## RUMMEL HAS NOT PROCEDURALLY DEFAULTED THE RIGHT TO CHALLENGE THE EXCESSIVE LENGTH OF HIS SENTENCE BY FAILING TO OBJECT ON THAT BASIS AT THE PUNISHMENT PHRASE OF HIS TRIAL.

The State argues that Rummel waived his Eighth Amendment claim by failing to raise it at the trial, Brief for the Respondent at 32-36, even though (1) the State raised this argument for the first time in the en banc court below, (2) the Eighth Amendment's application to sentence length alone was at the time of Rummel's trial and still is uncertain, (3) Rummel's objection would have been futile because Texas courts have consistently resisted such a claim, and (4) the policies underlying the procedural default doctrine do not apply here. The State's response to each of these four defenses is unsatisfactory.

First, the State claims that it did not waive the procedural default issue by failing to raise it below because the issue could not have been raised before the Court decided *Wainwright v. Sykes,* 433 U.S. 72 (1977). But *Wainwright,* which concerned a habeas corpus petitioner's right to challenge for the first time the voluntariness of a confession admitted into evidence at trial, only expanded a rule dating back to 1913. *See* cases cited, *id.* at 82. *Wainwright* did not make the procedural default doctrine any more or less applicable to this case.

Second, contrary to its earlier assertions, see Brief for the Respondent at 6-10, the State argues that the proportionality concept as a constitutional principle rests on many older cases, including *Weems* and the recent



death penalty cases, *id.* at 35 n.8, so that Rummel cannot claim to fall within an exception created by Texas courts for the failure to raise a constitutional claim not yet established.[12] *See* Brief for the Petitioner at 70. But even Respondent agrees that neither this Court nor Texas courts have ever applied the proportionality principle to sentence length alone. Brief for the Respondent at 8. To the extent that the *Weems* Court did, *see* Brief for the Petitioner at 21-22 n.9, the law in this area at the time of Rummel's trial in 1973 was certainly no more clear than the law of procedural default. Thus, if the "unestablished claim" exception cannot help Rummel avoid procedural default because the Eighth Amendment law was sufficiently clear in 1973, the State waived its right to raise the issue because pre-*Wainwright* law was also clear. If the exception protects Rummel, the State's argument fails on that basis.

Third, the State reasons that Rummel cannot claim futility because Texas courts had never rejected an as-applied challenge like his. But Texas courts have unanimously rejected Eighth Amendment challenges to sentence length with reasoning that forecloses such a challenge, *i.e.*, that a sentence within statutory limits can never be excessive.[13] Even as-applied challenges receive

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[12] Even the cases cited by Respondent, Brief for the Respondent at 33, support this exception. *See Ex parte* Bagley, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974) (citing approvingly to *Ex parte* Casarez, 508 S.W.2d 620 (Tex. Crim. App. 1974) (petitioner's failure to object at trial to use for enhancement of prior conviction allegedly void for lack of counsel did not waive his right to raise the issue by habeas corpus, since indigent's right to counsel had not been established at the time of petitioner's trial)).

[13] *See, e.g.*, Samuel v. State, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972) ("This court has frequently stated that where the punishment assessed . . . was within the limits prescribed by the

[footnote continued]

the same response.[14] And both the state district (R. 35) and appellate habeas courts (R. 31) rejected Rummel's argument. *See* Brief for the Petitioner at 72.[15]

Finally, the State urges that the *Wainwright* Court's concern that all fact issues be decided at trial is served here because Rummel's position raises fact issues best decided initially by the trial judge. Brief for the Respondent at 36. But this case requires resolution of no disputed fact issues and does not implicate the defense lawyer "sandbagging" problem that the *Wainwright* Court sought to prevent. *See Wainwright*, 433 U.S. at 89.

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statute the punishment is not cruel and unusual"); Reid v. State, 157 Tex. Crim. 65, 246 S.W.2d 197 (1952) (same); Stroud v. State, 145 Tex. Crim. 264, 167 S.W.2d 526 (1943) (same).

[14] *See* Flores v. State, 472 S.W.2d 146, 150 (Tex. Crim. App. 1971), where the defendant argued not only that article 63 was cruel and unusual, but also that his crime (burglary) was "trivial in nature" and thus implied that it was unsuitable for enhancement. In rejecting the latter claim, the court cited to a case, Beasley v. State, 389 S.W.2d 299, 301 (Tex. Crim. App. 1965), *cert. denied*, 382 U.S. 990 (1966), in which the court confronted—and rejected, citing previous holdings—only a per se attack on article 63. Thus, the Texas state courts clearly do not distinguish between per se and as applied Eighth Amendment attacks on sentence length and reject both under the same rationale.

[15] Contrary to the State's inference that the summary rejection of Rummel's claim might have rested on a waiver theory, *see* Brief for the Respondent at 34 ("even if [the state conviction court's summary] rejection [of Rummel's Eighth Amendment claim] were construed as a decision on the merits"), the trial court explicitly ruled Rummel's sentence not disproportionate (R. 53), and the appellate court agreed with the trial court's finding (R. 31). Moreover, these opinions must have been on the merits because the State never raised the waiver issue. (*See* R. 33-34).



## CONCLUSION

The judgment of the en banc court of appeals should be reversed and Rummel released from confinement.

Respectfully submitted,

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